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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOSEPH RA, Cross-complainant and Respondent, v. MICHAEL VAN BEMMEL, Cross-defendant and Appellant.	B285133 (Los Angeles County Super. Ct. No. SC125609)

APPEAL from an order of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Stroock & Stroock & Lavan, Arjun P. Rao and Crystal Y. Jonelis for Cross-defendant and Appellant.

Richie Litigation, Joshua G. Blum, Tanganica J. Turner and Jeffrey Elkrief for Cross-complainant and Respondent.

Michael Van Bemmel appeals from the order denying his special motion to strike under Code of Civil Procedure section 425.16 (section 425.16) directed to the cross-complaint for defamation filed against him by Joseph Ra. The trial court ruled the allegedly defamatory statements were not made in connection with a public issue or an issue of public interest and, therefore, were not protected speech activity within the meaning of section 425.16. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The O'Gara Coach Litigation and Ra's Cross-complaint*

In March 2016 Marcelo Caraveo and two related limited liability companies filed a complaint, and in July 2016 a first amended complaint, against O'Gara Coach Company, LLC, Joseph Ra and several other entities asserting causes of action for fraud, conversion and unfair business practices based on their allegedly wrongful conduct with respect to Caraveo's acquisition of luxury vehicles from O'Gara Coach.

Several months later Ra, a former senior executive of O'Gara Coach, filed a cross-complaint for defamation, intentional interference with contractual relations and indemnity against O'Gara Coach, its owner Thomas O'Gara and various other individuals including Michael Van Bemmel, the western region general manager of BMW Financial Services NA, LLC, a company that provides wholesale financing services for the automobile industry.[1] Van Bemmel was named a cross-defendant only in the cause of action for defamation.

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[1] O'Gara Coach filed its own cross-complaint against Caraveo, Ra and several other individuals and entities for breach of contract, fraud, conversion and related causes of action.

In his defamation claim Ra alleged, in part, that shortly after he was forced to resign from his position with O'Gara Coach in early 2016, the cross-defendants "all repeated the same thing: that Ra stole vehicles, stole money from O'Gara Coach, improperly rented O'Gara Coach's cars and stole the revenues from those rentals, and committed other criminal acts that resulted in both the Federal Bureau of Investigation and the Los Angeles District Attorney in search of Ra for prosecution." Ra further alleged, although Thomas O'Gara and Maureen Adford-O'Gara, on behalf of O'Gara Coach, started the false claims of theft, fraud and criminal prosecution by the FBI and the Los Angeles District Attorney, the other cross-defendants, including Van Bemmel "collude[d] with the O'Gara Defendants to ensure that Ra was removed and blackballed entirely from the ultra-luxury auto industry." The only allegedly defamatory statement attributed specifically to Van Bemmel was his purported "claim" that "Thomas O'Gara's financial downfall was the result of Ra's alleged criminal conduct." The cross-complaint does not identify anyone to whom Van Bemmel made that statement.

2. *The Special Motion To Strike*

a. *The moving papers*

Van Bemmel moved to strike Ra's cross-complaint (that is, the defamation cause of action, which named Van Bemmel as a cross-defendant) pursuant to section 425.16. Van Bemmel argued the defamatory statement alleged in Ra's claim constituted protected speech activity within the meaning of section 425.16, subdivision (e)(4), "as it stems from a matter of public interest; namely, alleged fraudulent practices of a car salesman." In his memorandum in support of the special motion

to strike, Van Bemmel reiterated this point, asserting alleged fraud in connection with the sale and lease of motor vehicles "is a broad topic of public interest" and insisting "[t]here can be no doubt that alleged fraudulent practices of a car salesman impact a broad segment of society and thus relate to matters of consumer protection and public concern." Van Bemmel also noted that automobile sales are heavily regulated in California and cited a recent section 425.16 case that had found government regulation of an industry a relevant factor in determining whether a written report had been made in connection with an issue of public interest.

Van Bemmel also contended Ra could not establish a probability of prevailing on his defamation claim. He argued there was no admissible evidence Van Bemmel made any of the statements discussed in the cross-complaint,[2] the statement criminal conduct had been alleged against Ra was true, and the statement as to the cause of Thomas O'Gara's financial downfall was a nonactionable opinion.

b. *Ra's opposition*

In his opposition papers Ra disputed that the defamatory statements alleged in his cross-complaint constituted protected speech activity. Ra relied primarily on *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, a defamation action in which the defendant, an avid "token" collector, had sent letters to fellow collectors and published negative comments in a newsletter about another collector's practices, including allegations of criminal

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[2] Van Bemmel submitted his own declaration in support of the motion, insisting he never made or "perpetuate[d]" any of the statements alleged in the cross-complaint.

conduct. The *Weinberg* court held there was no issue of public interest because the dispute was essentially a private matter between two collectors, resulting in a campaign by one to discredit the other "in the eyes of a relatively small group of fellow collectors." (*Id.* at p. 1135.) The fact that the statements accused the plaintiff of criminal conduct did not make them a matter of public interest. (*Ibid.*) Similarly, Ra argued, Van Bemmel's accusations about his misconduct at O'Gara Coach related to what was in essence a private matter, of concern only to a small group of people.

Ra also argued there was a sufficient factual basis for his defamation claim. With his opposition memorandum Ra submitted declarations from Viken Chelebian, the former general manager at one of the O'Gara Coach locations, and Jonathan Bran, a former employee at another location, who both stated they had heard Van Bemmel describe Ra as a thief and that he was the cause of Thomas O'Gara's financial ruin. These statements, Ra asserted, were false or, if considered opinion, implied provably false facts.

c. *Van Bemmel's reply*

Van Bemmel's reply memorandum repeated his argument the allegedly defamatory statements were made in connection with an issue of public interest because they implicated consumer protection in the heavily regulated automobile sales industry, rather than the "fringe topic of token collecting" at issue in *Weinberg v. Feisel*, *supra*, 110 Cal.App.4th 1122. Van Bemmel also analyzed the allegedly defamatory statements as described in the Chelebian and Bran declarations and explained the only

statements properly attributed to him were plainly nonactionable opinion and were not, in any event, false.[3]

3. *The Trial Court's Order Denying the Motion*

At the hearing on Van Bemmel's special motion to strike on July 20, 2017, the trial court read its tentative ruling denying the motion, heard oral argument and took the matter under submission. Later the same day the court entered its order denying the motion.[4] The court explained, "The alleged defamatory statements pertain to O'Gara's financial ruin and Ra's character and performance of his job. The statements allege criminal conduct in Ra's work as an employee of O'Gara. These statements are not an issue of public interest." The court cited in support of its ruling *Weinberg v. Feisel*, *supra*, 110 Cal.App.4th at page 1127.

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[3] Concurrently with his reply memorandum Van Bemmel filed objections to the substance of both declarations.

[4] In its July 20, 2017 order the court also sustained six of Van Bemmel's nine evidentiary objections to portions of the declarations submitted in support of Ra's opposition to the motion, including his objections to Bran's and Chelbian's summaries of statements they purportedly overheard Van Bemmel make about Ra.

DISCUSSION

1. *Section 425.16: The Anti-SLAPP Statute*[5]

Section 425.16 provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Pursuant to subdivision (e), an "'act in furtherance of a person's right to petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

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[5] SLAPP is an acronym for "strategic lawsuit against public participation." (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 413.)

Section 425.16 does not define "public issue" or "public interest" as used in subdivision (e)(4), and those terms are "'inherently amorphous and thus do not lend themselves to a precise, all-encompassing definition.'" (*Healthsmart Pacific, Inc. v. Kabateck* (2016) 7 Cal.App.5th 416, 428; accord, *MMM Holdings, Inc. v. Reich* (2018) 21 Cal.App.5th 167, 179.) Nonetheless, "public interest" is to be broadly construed (see, e.g., *Dual Diagnosis Treatment Center, Inc. v. Buschel* (2016) 6 Cal.App.5th 1098, 1104; *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 115), and courts analyzing section 425.16, subdivision (e)(4), have held it includes not only government matters but also "private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 737; accord, *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479; see *Industrial Waste & Debris Box Service, Inc. v. Murphy* (2016) 4 Cal.App.5th 1135, 1151.) Examples include situations in which the subject of the statement or activity was either "a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants [citations] or a topic of widespread, public interest." (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924.) However, "'[a] matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest.'" (*Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 82; see *Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 481 [§ 425.16 "requires the issue to include

attributes that make it one of public, rather than merely private, interest"].)

In ruling on a motion under section 425.16, the trial court engages in a now-familiar two-step process. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) "Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, italics omitted.)

We review de novo an order granting or denying a special motion to strike under section 425.16 (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067), considering the parties' pleadings and affidavits describing the facts on which liability or defenses are predicated. (§ 425.16, subd. (b)(2); see *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89.)

2. *Van Bemmel's Allegedly Defamatory Statement Did Not Constitute Speech in Connection with a Public Issue or an Issue of Public Interest*

Van Bemmel contends the trial court erred in ruling he had failed to satisfy the first prong of the anti-SLAPP analysis, arguing issues of consumer protection and fraud in the automotive industry are matters of public interest within the meaning of section 425.16, subdivision (e)(4). However, as this court explained in *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1253, "simply because a general topic is an issue of public interest, not every statement somewhat related to that subject is

also a matter of public interest within the meaning of section 425.16, subdivision (e)(3) or (4)."[6] (See *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898 ["it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate"].)

Van Bemmel's contention that accusations of Ra's criminal activity, allegedly made to several other individuals involved with luxury car sales and leasing, sufficiently concern the general topic of fraud in the automotive industry to constitute speech in connection with an issue of public interest is premised on the fallacy identified in *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34, as "the synecdoche theory of public issue in the anti-SLAPP statute. The part is not synonymous with the greater whole." The *Commonwealth Energy* court held, while information about protecting consumers from deceptive investment schemes might concern an issue of public interest, statements promoting a company's investigatory

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[6] In *Jackson v. Mayweather*, *supra*, 10 Cal.App.5th 1240 we expressed doubt whether defendant's assertion his former girlfriend had an abortion, his posting of a copy of a sonogram of the twin fetuses or his personal statement of opposition to "killing babies" constituted protected speech activity because they contributed to the public debate on women's reproductive rights, as the trial court had ruled. (*Id.* at p. 1253.) However, we did not need to decide the case on that basis because the evidence established that plaintiff and defendant were both high profile individuals subject to extensive media scrutiny. As such, the challenged statements were "celebrity gossip" properly considered as statements in connection with an issue of public interest under established case law. (*Id.* at p. 1254.)

services are not. (*Ibid.* ["hawking an investigatory service is not an economics lecture on the importance of information for efficient markets"].)

To the same effect, in *Dual Diagnosis Treatment Center, Inc. v. Buschel*, *supra*, 6 Cal.App.5th 1098 the court of appeal held, while discussion of drug and alcohol rehabilitation services may well be an issue of public interest, the licensing status of a single rehabilitation facility—at issue in the case before it—was not. (*Id.* at pp. 1105-1106 ["[t]here is no showing that the San Clemente rehabilitation facility impacts, or has the potential to impact a broad segment of society, or that the statements were part of some larger goal to provide consumer protection information"; "[a]lmost any statement, no matter how specific, can be construed to relate to some broader topic"].) Similarly, in *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, 601, the court of appeal held that advertising claims relating to the promised benefits of a specific herbal supplement did not concern an issue of public interest, even if a broader discussion of alternative medicine or herbal supplements in general might. (See *Bikkina v. Mahadevan*, *supra*, 241 Cal.App.4th at p. 84 [defendant's statements "were only remotely related to the broader subject of global warming or climate change, and involved specific accusations of plagiarism and use of a contaminated sample"]; *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 111 [although pollution is a matter of general public interest, defendants' alleged statements "were not about pollution or potential public health and safety issues in general, but about [the plaintiffs'] specific business practices" and thus were not protected activity within the meaning of section 425.16], disapproved on another ground in

Baral v. Schnitt, *supra*, 1 Cal.5th at p. 392; cf. *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1367 [web posting was of public interest because it dealt with the general issue of effects of dentists' use of certain products, not just a highly critical opinion of a particular dentist]; *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23-24 [website posting not only criticized a widely known plastic surgeon but also contained information concerning "'nightmare' results that necessitated extensive revision surgery," thereby contributing to the general debate of "pros and cons of undergoing cosmetic surgery"].)

Fraud in the automotive industry may well be a matter of greater public concern than criminal activity among token collectors. But, as in *Weinberg v. Feisel*, *supra*, 110 Cal.App.4th 1122, Van Bemmel's allegedly defamatory statements about Ra's misconduct while an employee of O'Gara Coach related to "a private dispute between private parties." (*Id.* at p. 1134.) And as was true with the challenged statements in the cases discussed in the preceding paragraphs, including *Dual Diagnosis Treatment Center, Inc. v. Buschel*, *supra*, 6 Cal.App.5th 1098, and *Bikkina v. Mahadevan*, *supra*, 241 Cal.App.4th 70, those statements were only remotely related to the broader subject identified by Van Bemmel to support his argument that Ra's defamation claim arises from activity protected by section 425.16.

The cases cited by Van Bemmel, such as *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138 and *Carver v. Bonds* (2005) 135 Cal.App.4th 328, do not require a different result.[7] In *Chaker*

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[7] *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, also cited by Van Bemmel, held the statements at issue were made in connection with a matter of public interest because the subject of the statements was "'a prominent businessman and

the plaintiff sued the defendant for defamation after she had posted a series of derogatory statements about plaintiff and his forensics business on an Internet website where members of the public could comment on the honesty and reliability of various providers of goods and services. (*Chaker*, at p. 1142.) The court of appeal held the statements about defendant's character and business practices were of public interest because they "plainly fall within the rubric of consumer information about Chaker's 'Counterforensics' business and were intended to serve as a warning to consumers about his trustworthiness." (*Id.* at p. 1146.) Van Bemmel's allegedly defamatory statements about Ra, in contrast, were not broadcast on the Internet or any similar public forum and made no attempt to warn consumers about Ra's business practices.

Similarly, in *Carver v. Bonds*, *supra*, 135 Cal.App.4th 328, a defamation action based on statements published in the San Francisco Chronicle, the court held the article involved an issue of public interest within the meaning of section 425.16, subdivision (e)(4), because it did not simply disparage the plaintiff physician's skills and expertise, but "warned readers not to rely on doctors' ostensible experience treating professional

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celebrity of Finnish extraction,'" as to whom there was "'extensive interest" among the Finnish public. (*Id.* at p. 1042.) Similarly, in *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226 it was the plaintiff's status as a nationally known political consultant who had developed campaigns based on the prevention and punishment of domestic violence that made the reports of his alleged abuse of his former wives a public issue, not the charge of domestic violence itself. (*Id.* at pp. 239-240.) Van Bemmel makes no similar claim that Ra enjoys celebrity status.

athletes, and told what it described as 'a cautionary tale' of plaintiff exaggerating that experience to market his practice." (*Carver*, at p. 344.) In addition, the article provided other information to assist patients in choosing doctors. (*Ibid*.) The comments Ra attributes to Van Bemmel were not directed to potential customers and provided no comparable information to guide responsible selection of an automobile dealership.

In sum, although the public interest for purposes of section 425.16, subdivision (e)(4), may extend to statements about conduct between private individuals, "[a] matter of ""public interest should be something of concern to a substantial number of people. [Citation.] . . . [T]here should be some degree of closeness between the challenged statements and the asserted public interest . . . .' '[T]he focus of the speaker's conduct should be the public interest . . . ."""" (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 465; accord, *Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 716.) None of those criteria is satisfied here. Van Bemmel's alleged statements about Ra's criminal activity were a matter of concern to a relatively small group of individuals associated with O'Gara Coach's business; they were at most only tangentially related to the broad topic of fraud in the automotive industry; and, as described in Ra's cross-complaint, the statements were not intended to warn consumers or provide information to guide their conduct. The trial court properly denied the special motion to strike.

DISPOSITION

The order denying the special motion to strike is affirmed. Ra is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.